Babcock & Wilcox, Nuclear Operations Group, Inc. *and* International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local #900. Case 08–CA–138022

December 3, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On December 31, 2014, the Regional Director for Region 8 issued a complaint and notice of hearing in this case, alleging that Babcock & Wilcox, Nuclear Operations Group, Inc. (the Respondent) violated Section 8(a)(3) and (1) by disciplining employee Larry Stauffer for engaging in union and/or protected concerted activities. The Respondent filed an answer admitting in part and denying in part the allegations of the complaint and asserting affirmative defenses.

On January 14, 2015, the Respondent filed with the Board a motion to dismiss the complaint, arguing that the Board should defer the complaint allegation to the parties' contractual grievance-arbitration procedure. The General Counsel filed an opposition to the Respondent's motion, and the Respondent filed a reply. On March 12, 2015, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the motion should not be granted. The Respondent and the General Counsel each filed responses, and the Respondent also filed a reply. International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local #900 (the Union) filed no opposition to the motion to dismiss or response to the Notice to Show Cause.

For the reasons set forth below, we grant the Respondent's motion to dismiss.

The complaint alleges as follows. The Union has represented a unit of employees at the Respondent's Barberton, Ohio facility since 1956. The parties' current collective-bargaining agreement is effective from May 1, 2013, to April 30, 2017. On August 18, 2014, Stauffer, acting in his capacity as a union steward, submitted, on behalf of himself, a "Missed Overtime" form to his immediate supervisor. Shortly after Stauffer submitted the "Missed Overtime" form, Supervisor Dave McLaughlin approached him to discuss the situation. On September 11, 2014, Stauffer received a letter from the Respondent's superintendent, Jim Ingersoll, which stated the following:

> On August 18, 2014, supervisor Dave McLaughlin met with you on the production floor to explain why your weekend overtime was cancelled. Your reaction to the supervisor's explanation was not appropriate or respectful. This is the most recent situation where your actions have been viewed as disrespectful toward peers and people with positions of authority. This type of approach is not acceptable and will not be permitted at our facility. Please be advised that if there is a recurrence of this behavior in the future, you may be subject to greater discipline, up to and including discharge. We appreciate your passion and strong work performance, but simply can't have these outbursts occurring at our facilities and disrupting our operations.

The complaint alleges that the Respondent, in violation of Section 8(a)(3) and (1), issued this disciplinary letter to Stauffer because he communicated a missed overtime claim to the Respondent in his capacity as a union steward.

The parties' collective-bargaining agreement contains a grievance-arbitration procedure that culminates in the following arbitration provision:

> All differences, disputes, or grievances between the Company and the Union pertaining to the terms of this Agreement, that shall not have been satisfactorily settled after following the grievance procedure as set forth in Article 6 of this agreement, shall be submitted to an Arbitrator whose written decisions shall be final and binding upon both parties.

The parties' collective-bargaining agreement states that employees may challenge a discharge if they believe that it was unjust, but it does not include a provision that directly addresses unjust discipline. However, the Respondent claims that the parties have used the grievance-arbitration procedure to process claims that an employee was disciplined without just cause where the discipline did not result in discharge. Additionally, the Respondent claims that, in the past 6 years, neither the Union nor any individual employee has alleged that the Respondent unlawfully disciplined an employee for engaging in protected concerted activity or that the Respondent violated the Act in any other manner. Further, the Respondent claims that, in the past 6 years, the Respondent and the Union have processed over 160 grievances through the grievance-arbitration procedure. The General Counsel does not dispute any of these claims.

The Respondent contends that the unfair labor practice allegation should be deferred to the grievance-arbitration procedure provided for in the parties' collective-bargaining agreement. The General Counsel contends that this matter is not appropriate for deferral because there is a claim of employer animosity to the employees'

exercise of protected statutory rights, and the arbitration clause does not clearly encompass the dispute at issue.

"The Board has considerable discretion to defer to the arbitration process when doing so will serve the fundamental aims of the Act." *Wonder Bread*, 343 NLRB 55, 55 (2004). The Board finds prearbitral deferral appropriate when the following factors are present:

> [T]he dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected statutory rights; the parties' agreement provides for arbitration of a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution.

Id.; see also *United Technologies Corp.*, 268 NLRB 557, 558 (1984); *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971).[1]

Applying these factors, we agree with the Respondent that deferral is appropriate. The parties have had a long and productive collective-bargaining relationship, the grievance-arbitration procedure provides for the arbitration of a very broad range of disputes, the Respondent has asserted its willingness to utilize arbitration to resolve the dispute,[2] and there is no indication that the dispute is not eminently well suited to such resolution.

The single allegation that the Respondent violated Section 8(a)(3) and (1) by issuing Stauffer a warning letter in reprisal for engaging in protected union activity does not, by itself, establish that there is a claim of employer animosity to employees' exercise of protected statutory rights. See, e.g., *Clarkson Industries*, 312 NLRB 349, 352 (1993) ("[T]he single 8(a)(1) allegation of a threat to hold the union steward to a higher standard and the single 8(a)(3) allegation of a discriminatory warning, are not, by themselves, so egregious as to render the use of the arbitration machinery unpromising or futile."); *United Technologies*, supra at 557 (finding deferral appropriate where the employer was alleged to have violated Section 8(a)(1) by threatening an employee "with disciplinary action if she persisted in processing a grievance to the second step"). The parties' frequent use of the grievance-arbitration procedure in the past 6 years indicates that its use in this case would not be unpromising or futile.

The General Counsel argues that the Board does not defer cases that involve an allegation that the employer discriminated against an employee while that employee was acting in his or her capacity as a union steward. Although the Board has been reluctant to defer under circumstances that raise concerns about the fairness or availability of the grievance procedure,[3] there is no per se rule regarding deferral of such cases. To the contrary, the Board has deferred cases involving alleged discrimination against union stewards where it was satisfied that the parties' grievance procedure "[could] reasonably be relied upon to function properly and to resolve the current disputes fairly." *United Aircraft Corp.*, 204 NLRB 879, 879 (1972), review denied sub nom. *Machinists Lodges 700, 743, 1746 v. NLRB*, 525 F.2d 237 (2d Cir. 1975); see also *United Beef Co.*, 272 NLRB 66 (1984); *United Technologies*, supra.

Although the parties' collective-bargaining agreement lacks language that expressly provides for the resolution of claims of unjust discipline less than discharge, the Respondent states, and neither the General Counsel nor the Union disputes, that in the past, the parties have used the grievance-arbitration procedure to process claims of unjust discipline less than discharge. In *E. I. Du Pont & Co.*, 293 NLRB 896 (1988), the Board found that because the union and the employer had previously processed a work-assignment dispute through their contract's grievance-arbitration procedure, the parties "both consider[ed] issues regarding work assignment to be subject to the grievance-arbitration process, notwithstanding the absence of specific contractual language."

[1] The Board recently modified its prearbitral deferral standard in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132, slip op. at 12–13 (2014). However, the new standard applies only prospectively. See id., slip op. at 13–14. Therefore, it does not apply in this case, which was pending at the time that *Babcock & Wilcox*, supra, was decided. Member Miscimarra dissented from the new deferral standard articulated in *Babcock*. Id., slip op. at 14–24 (Member Miscimarra, concurring in part and dissenting in part). However, he concurred with the *Babcock* majority's decision that the new standard would only be applied prospectively. Id., slip op. at 15.

[2] The Respondent asserts that it is willing to waive any timeliness objections or other procedural defenses to a grievance.

[3] Member Hirozawa notes that the Board has declined to defer where an employer has attempted to thwart a union steward's pursuit of grievances, finding that such conduct "strikes at the foundation of that grievance and arbitration mechanism upon which we have relied in the formulation of our *Collyer* doctrine." *Joseph T. Ryerson & Sons, Inc.*, 199 NLRB 461, 462 (1972) (declining to defer an allegation "that a respondent has sought, by prohibited means, to inhibit or preclude access to the grievance procedures"). Accord *Ram Construction Co.*, 228 NLRB 769, 774 fn. 18 (1977), enfd. sub nom. *Lastooka v. NLRB*, 566 F.2d 1169 (3rd Cir. 1977); *Wabash Asphalt Co.*, 224 NLRB 820, 823 (1976) (applying *Ryerson* in circumstances where employees sought to enforce their collective bargaining rights but never formally invoked the grievance procedure). Cf. *United Technologies*, supra at 560 fn. 21 (distinguishing *Ryerson* and *Wabash* based on "'the existence of a workable and freely resorted to grievance procedure'" (quoting *Postal Service*, 210 NLRB 560, 560 fn. 1 (1974)).

Id. at 897.[4] Similarly here, the fact that the Respondent and the Union have previously used the grievance-arbitration procedure to process claims of unjust discipline less than discharge indicates that they both consider such disputes to be subject to the grievance-arbitration process. Accordingly, as the Board stated in *E. I. Du Pont*, supra, the "likelihood" that the dispute at issue here is "arbitrable is sufficiently great that the absence of specific contract language on the subject should not preclude deferral." Id.

For the above reasons, we find that deferral is appropriate, and we shall grant the Respondent's motion to dismiss the complaint.

ORDER

IT IS ORDERED that the complaint is dismissed. The Board retains jurisdiction of this proceeding for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result that is repugnant to the Act.

Dated, Washington, D.C. December 3, 2015

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

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[4] The Board also observed that "arbitrators frequently find that customs and past practices may become part of the 'law of the shop' and thus enforceable through arbitration, even if they are not a part of the written contract, and the Supreme Court has recognized arbitrators' authority to do so," citing *Steelworkers v. Gulf Navigation*, 363 U.S. 574, 581–582 (1960). Id.